



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 18 OF 2017

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW
PROCEEDINGS**

AND

IN THE MATTER OF ARTICLE 10, 27 47 AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF PUBLIC OFFICERS ETHICS ACT, 2013

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 28 OF THE
LAWS OF KENYA**

BETWEEN

CLARE CHADDAH LWALIAPPLICANT

VERSUS

THE DIRECTOR NATIONAL YOUTH SERVICE1ST RESPONDENT

MINISTRY OF PUBLIC SERVICE,

YOUTH AND GENDER AFFAIRS2ND RESPONDENT

CABINET SECRETARY PUBLIC SERVICE.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. Vide a notice of motion dated 20th January 2017 filed pursuant to leave granted on 19th January 2017, the ex parte applicant **Clare Chaddah Lwali** seeks from this court the following orders of Judicial Review:

a. **Certiorari** to bring into the High Court for the purpose for quashing the decision of the 1st respondent (Director National Youth Service) made on 9th November, 2016 determining that the applicant should vacate the Government house occupied by her on or before Friday 11th November, 2016;

b. **Prohibition** prohibiting the 1st respondent from issuing directives of such a nature pending the hearing and determination of the Anti- corruption case No. 21 of 2016;

c. Any other relief that this Honourable court may deem just and expedient to grant.

d. Costs of the application be provided.

2. The notice of motion is predicated upon the grounds set out in the statutory statement filed on 17th January 2017, the verifying affidavit of Clare Chaddah Lwali filed together with the application for leave on 17th January 2017.

3. The ex parte applicant's application is brought under Articles 10,27,47,232 of the Constitution, Order 53 Rule 1(3) (4) of the Civil Procedure Rules, 2010, Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya.

4. The ex parte applicant's case as stipulated in the statutory statement and depositions in her verifying affidavit is that she has been a workaholic employee of the National Youth Service having joined the institution in the 1990 thus bearing the personal number 90117863.

5. That as a result of her hard work, determination and dedicated service to the Republic, she received several accolades which include but not limited to her promotion to the high echelons of leadership of the service as the Deputy Director General.

6. That to date she continues to work in her such capacity and she continues to enjoy the privileges and benefits accruing from her office.

7. That on or before 15th November 2016, she was arraigned before court to take a plea on allegations of abuse of office.

8. That she received stern instructions from the Permanent Secretary advising her to join the Ministry as the advisor to the Cabinet Secretary Devolution. On Matters related to National Youth Service.

9. That upon taking up the assignment she was verbally instructed to report back to her initial work station at the service.

10. That however, she has been back and forth with the intention of unprocedurally and unconstitutionally removing her from office.

11. That on 24th December 2016, the ex parte applicant received a letter dated 9th November 2016 commanding her to compulsorily vacate the government house she occupies by virtue of her position in the service and as a government employee on or before 11th November, 2016. That the notice to vacate the house has affected her family emotionally, psychologically traumatized and left her apprehensive of being rendered homeless and destitute.

12. The ex parte applicant claims that she was never accorded an opportunity to be heard before

being ordered to vacate the government house, contrary to Article 47 of the Constitution and Section 4 and d 6 of the Fair Administrative Action Act, 2015.

13. Further, that the respondent's actions contravened Section 9 of the Public Officers Ethics Act which stipulate that public officers are enjoined by Section 9 to respect the rights and freedoms of any person under Part V of the Constitution.

14. It was claimed that the action by the respondent flies in the face of the presumption of innocence; was made in bad faith and was devoid of the requirement for a hearing and notice to vacate the house in good time.

15. The notice of motion was opposed by the respondents through the replying affidavit sworn by Richa Ndubai the Director General of National Youth Service who deposes that the applicant was first appointed by National Youth Service on 28th August 1990 as a training officer and thereafter deployed to the Ministry of Public Service, Youth and Gender Affairs from 7th January 2016 as Liaison Officer and designated as Senior Deputy Director, National Youth Service and allocated the suit premises which are located within the National Youth Service Engineering Institute, to enable her carry out her duties optimally as the commanding officer who worked beyond normal or regular official working hours.

16. That therefore having been deployed to the headquarters, the ex parte applicant ceased being an employee of the National Youth Service and consequently she ceased to enjoy the benefits of the continued occupation of the National Youth Service house and a formal notice to her to vacate the house was issued to her.

17. That subsequently the 1st respondent made several verbal requests to her to vacate the house but she ignored prompting the 1st respondent to issue her with a final notice dated 9th November 2016.

18. That the applicant's continued, occupation of the house is negatively impacting on the capacity of the current commanding officer to efficiently execute his duties as he is forced to operate from outside the institution.

19. That therefore the ex parte applicant's application is misconceived and an abuse of the court process, baseless, lacks merit and should therefore be dismissed with costs to the respondents.

20. The parties advocates did agree on 10th April 2017 to dispose of the notice of motion by way of written submissions but as at 29th May 2017, when the matter came up for highlighting of the submissions, only the respondents had filed written submissions. The court directed parties to urge the matter and the applicant's counsel Mr Omari therefore chose to make oral submissions while the respondent counsel Ms Ngelechei adopted her written submissions, urging the court to dismiss the ex parte applicant's application with costs.

21. According to the ex parte applicant, she was a Senior Deputy Director of National Youth Service. That the Ethics and Anti-Corruption Commission started investigating her on allegations of corruption at the National Youth Service. She was later arraigned in court vide Ethic sand Anti-Corruption Commission case No. 21/2017. By that time, she had been deployed to the Headquarters after Government reorganization of the office.

22. She was then ordered to vacate the government house which she was occupying. She asserts that she is still a civil servant under the Ministry of Public Service, Youth and Gender Affairs.

23. Further, that under the Public Service Code, once one is charged in court, she retains all her housing and other facilities only that she gets half salary pending the determination of the criminal case. That she has lived in the said government house for 19 years and deserved to be treated as innocent until proved guilty. That the Public Service Commission is her employer and that since it is her and not her

family staying in the house, it is an abuse of Fair Administrative Action to urge her to vacate the house.

24. On the part of the respondents, reliance was placed on the written submissions filed on 6th April 2017.

25. According to the respondents, the applicant's continued occupation of the subject house by the applicant which is solely reserved for occupation by the institution's commanding officer is negatively impacting on the capacity of the current commanding officer to efficiently execute her duties as the commanding officers duties require that he or she works beyond the regular working hours.

26. That housing provision is entailed in the Public Service Commission Human Resource Policies Manual for public service, 2016 and allocation of government houses is provided under Section D, D1(2) inter alia, that government institutional houses shall be allocated at the station where an officer is posted for duty.

27. It was submitted that in view of the above policy, the respondent did not act illegally or ultra vires or in bad faith in asking the applicant to vacate the premises.

28. Reliance was placed on **James Obura Obongo vs Mombasa County Director of Housing [2015] e KLR** where the court held inter alia that: *it would amount to denying another civil servant stationed in Mombasa an opportunity to occupy the government quarter by allowing the applicant to continue occupying a government quarter.....if the applicant is interested in retaining his family in Mombasa, he is at liberty to source private accommodation for the family to allow another officer posted to Mombasa station to occupy that government quarter."*

29. The court further stated that : *"there was nothing unreasonable or in defiance of logic in code of regulations requiring a civil servant to vacate a government quarter in one station upon transfer to another station. That it is both equitable and just that no one civil servant should enjoy both a right to enhanced house allowance and simultaneously enjoy the privileges of occupying a government quarter, which is allocated on the basis of being stationed where the civil servant works."*

30. On unreasonableness, it was submitted that the applicant had not demonstrated that the respondents violated any law by being given a notice to vacate a house and that there is sufficient evidence to show that she had been given sufficient, notice to vacate the premises from 28th June 2016 and the notice of 9th November 2016. Reliance was placed on **Japheth Ms Musee & Another v Attorney General & 2 Others [2012] e KLR** where the court held, inter alia, that:

" Besides the applicants have not pointed to any law that supports their claim that supports their claim that the 3rd respondent was not mandated to issue them with quit notices and that therefore the notices served on them by the 3rd respondent were illegal."

31. On the claim of error of material facts, it was submitted that the notice to vacate the house had no bearing on the ongoing anti- corruption court case but purely based on the fact that the applicant was no longer serving in the National Youth Service Engineering Institute as she was deployed to the Ministry Headquarters.

32. Further, that the notice is predicated on the fact of the nature of the work of commanding officer of the institution and that Director of National Youth Service has no reason to act in bad faith against the applicant. The respondents urged the court to dismiss the application.

DETERMINATION

33. I have considered the foregoing and in my humble view, the question to be answered in this matter is whether the exparte applicant is entitled to the orders sought.

34. It is not in dispute that the *exparte* applicant is a senior public servant who served as a Senior Deputy Director of the National Youth Service and who was being housed at the place of work-National Youth Service Engineering Institute. It is also not in dispute that she is still in the public service and was transferred to the headquarters.

35. It is further not in dispute that she is facing a corruption charge and is on half pay and was therefore upon transfer to the Headquarters, replaced by another officer commanding the institute and was by a written notice of 9th November 2016 asked to vacate the government House by 11th November 2016 to enable the Commanding Officer to occupy it. She was deployed as a Liaison Officer on matters of National Youth Service reporting to the Cabinet Secretary from 8th January 2016 vide letter of 7th January 2016. It was while she was at the headquarters that she was arraigned in court on allegations of abuse of office which is alleged to have taken place on 26th September 2015 at the National Youth Service Headquarters at Ruaraka.

36. The applicant resists the notice to vacate the government house alleging impropriety, unreasonableness and bad faith and *ultra vires*.

37. On the part of the respondents, they contend that the notice to vacate the government house is made in good faith because it is a policy of the Public Service Human Resource Manual on allocation of government quarters that one is allocated a government quarter at the station where an officer is posted for duty.

38. However the purported Human Resource Manual was never annexed to the respondent's replying affidavit. In addition, there is no evidence to show that the officer who was sent to replace the *exparte* applicant was supposed to occupy the house that she is occupying. The notice dated 9th November 2016 simply refers to several verbal communications on the vacation of government house and stating that:

“I have been instructed by the Director General National Youth Service to notify you to vacate the house on or before Friday 11th November 2016 without fail. Kindly comply.”

39. It is therefore pretentious on the part of the respondents to claim that the purpose of the notice was to allow another officer to occupy the house. There was no evidence of prior oral notices to her to vacate the house. There was also no evidence that from 8th January 2016 when she was expected to report to the headquarter, the *exparte* applicant was also expected to vacate her house to give way for the incoming officer and if that was so, nothing prevented the respondents from saying so.

40. In addition, albeit the case of James Obura (*supra*) was relied on by the respondents, that case can be distinguished from the facts of this case in that in the former case, the officer had been transferred from Mombasa, to Malindi and he left the station but retained his family in the government house and was resisting to move out his family to allow another officer to occupy it. That is the reason why the learned judge (Emukule J(as he then was), was categorical that ***“it would amount to denying another civil servant stationed in Mombasa an opportunity to occupy the government quarter by allowing the applicant to continue occupying a government quarter.....If the applicant is interested in retaining his family in Mombasa, he is at liberty to source private accommodation for the family to allow another officer posted to Mombasa station to occupy that government quarter.”***

41. In the instant case, there is no allegation that the applicant has been transferred from the station but has retained her family in the government quarter.

42. There is also no allegation and evidence that she is benefiting twice from the housing policy that is, that she is being paid a house allowance while at the same time, she is stuck in the government house thereby earning a double benefit.

43. The respondents did not annex any housing policy for the Commanding Officer of the institute to live in the institute's house, which is a stone's throw away from the Headquarters.

44. It is for that reason that I find the notice of two days to vacate the government house unreasonably short as the *ex parte* applicant could not be expected to source an alternative housing in Nairobi within 2 days of the notice to vacate the government quarter and no reasonable public officer would be expected to give such a notice to another senior serving public officer to vacate a government house.

45. Article 43(b) of the Constitution of Kenya guarantees every person the right to accessible and adequate housing and to reasonable standards of sanitation. It would therefore be a violation of the *ex parte* applicants fundamental human right to adequate housing for her to be ordered to vacate a government house within 2 days without proof of available alternative housing or house allowance. Two days' notice is with utmost respect, not adequate or even sufficient notice. It is unreasonable notice and it is for that reason that this court must intervene to protect the *ex parte* applicant's right to adequate housing and to unreasonable notice and threatened eviction which will render her without alternative accommodation and public embarrassment in violation of her inherent right to dignity.

46. This is not to say that the *ex parte* applicant cannot vacate the house or be issued with notice to vacate the house which she occupied by virtue of her employment and duties as the Commanding Officer of the institute.

47. Furthermore, albeit it is alleged that the continued occupation of the subject house is negatively impacting on the capacity of the current commanding officer to effectively execute her duties and that he (sic) is forced to operate to and from outside the institute, the said commanding officer is not disclosed and neither has he/she sworn any affidavit to show how operating to and from outside the institute and (where) exactly, is affecting efficient execution of duties as aforesaid.

48. Albeit it is claimed that the law which the applicant alleges was breached by the notice was not disclosed, in my humble view, it is the *ex parte* applicant's rights to adequate housing and to fair administrative action that are affected by the 2 days notice which I find unreasonable, and going by the decision in James Obura (supra), it is clear that the applicant herein, unlike the applicant in the James Obura case, has not been transferred out of Nairobi station. The transfer was only as far as offices and work were concerned, unlike in the James Obura case where the applicant was transferred out of Mombasa and wanted his family to remain in the government house.

49. Even Section L5 of the Civil Servants Regulations referred to in the Obura case stated: ***"Government Quarters are allocated at the station where the officer is posted for duty."*** As to whether the '*station*' referred to is one and the same thing as the institute premises is not clear since the Regulations were not placed before this court for perusal and understanding of the interpretation of the word '*station*'.

50. In the James Obura case, the applicant had been posted to Malindi from Mombasa which is not the same as this case where the applicant was deployed from the institute which is within Nairobi, the Headquarters which is still in Nairobi.

51. Whereas I do not find that a notice to vacate government quarter upon transfer is unreasonable within the Wednesbury's principles, the only unreasonableness that I find defies logic in this case is to give a notice of 2 days to vacate premises which a Senior civil servant working within the same locality (Nairobi) can be given which in my view is outrageous and morally unacceptable, especially in the absence of any evidence that the occupant was earning housing allowance and was simultaneously occupying a government house which ought to be occupied by another officer.

52. For the above reasons, I find and hold that the *ex parte* applicant's motion is merited. I grant prayer No.1 and issue certiorari bringing into this court for the purpose of quashing and I hereby quash the decision of the 1st respondent, National Youth Service communicated vide letter dated 9th

November 2016 determining that the applicant should vacate the government house occupied by her on or before Friday 11th November, 2016.

53. Having quashed the decision of the 1st respondent, there remains nothing to be prohibited as I have found that there is nothing illegal in issuing a reasonable notice to vacate the premises, having regard to the circumstances of the case. Moreso, as there is no evidence linking the notice to vacate the premises and Anti-Corruption case No. 21/2016, I find no merit in the prayer for prohibition.

54. Accordingly, I decline to grant judicial review order of prohibition I order that each party shall bear their own of these Judicial Review proceedings for leave and the main motion.

Dated, signed and delivered in open court at Nairobi this 17th Day of October, 2017.

R.E. ABURILI

JUDGE

Judgment delivered as scheduled in open court in the absence of parties or their legal counsels and in the presence of Court Assistant: Marylyn